



Ecological Restoration Business Association
8270 Greensboro Drive, Suite 700
Tysons, Virginia 22102
P: 703-584-8375 · www.ecologicalrestoration.org

Mr. David P. Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460
Docket No. EPA-HQ-OW-2019-0415

December 18, 2019

RE: Water Quality Trading Under the National Pollutant Discharge Elimination System (NPDES) Program

Dear Mr. Ross:

The Ecological Restoration Business Association (ERBA) appreciates the commitment of the Environmental Protection Agency (the “Agency”) to policies that support market-based mechanisms to achieve water quality goals. ERBA members are experienced practitioners in the delivery of accountable and robust ecological offsets under multiple environmental programs. Over the past several years, ERBA members expanded their expertise and services into water quality markets, often on a geographical basis and following the establishment at the regional level of robust water policies that support our market driven businesses.

We believe that the expansion of water quality trading markets will lead to greater efficiencies and environmental benefits for the public and permittees subject to water quality trading limitations. These benefits could extend beyond compliance with total maximum daily loads (TMDLs) under the NPDES program, and we encourage the Agency to consider opportunities for market solutions under other water quality and restoration programs. We flag some of these opportunities in our comment letter below, while also offering recommendations and a practitioner perspective on current barriers within the NPDES program to fully performing water quality markets.

Recommendations for Additional Clarity in Proposed Definitions

ERBA supports policy changes to increase flexibility in the interpretation of baseline load allocations. In many regions, baselines are currently too stringent in their definitions and hinder production of water quality trading credits. [Some baselines may be defined by a certain number of best management

practices (BMPs) without consideration for that BMP's scale of load reduction. As an example, for an agricultural producer to reach a baseline in Virginia and qualify to generate credits in excess of that baseline, the agricultural producer must apply five specific conservation practices to all contiguous parcels deeded to the same landowner – meaning the same or even adjacent parcels that may be divided by public or private right-of-way. Such stringent requirements for “baseline” and the applicable “management area” are likely the reason why Virginia’s robust trading program has not involved the implementation of those specific conservation practices. As a result, the agricultural sector in Virginia has not benefitted from an influx of private investments via a market-based trading program to help the sector meet its Chesapeake Bay clean-up responsibilities. More flexibility in the interpretation of baselines will increase compliance options within watersheds and incentivize non-point sources to pursue water quality trading credits.

Generally ERBA supports the language and tools proposed by the Agency to achieve this flexibility, but the proposal would benefit from additional clarification and examples of permit language under the new baseline approach. For example, the revised definition of baseline would allow for generation of credits for reduction activities “provided there is *reasonable assurance* that the overall load allocation will, over time, be met” (emphasis added). The requirement of a “reasonable assurance” is critical to the new baseline interpretation, but is a subjective phrase and does not offer a clear guarantee of compliance with the load allocation. ERBA recommends that the Agency offer examples of “reasonable assurances” or otherwise revise the term with more specific language. Relatedly, ERBA recommends that the Agency provide examples of how the new concepts of “baseline,” “incremental baseline,” and “compliance schedule,” would be expressed in NPDES permit language. Examples offer stakeholders an insightful understanding of the concepts and the Agency’s intent for implementation.

In particular, ERBA recommends that the Agency provide additional guidance on how Water Quality Standard (WQS) variances may be used in the context of water quality trading to comply with a TMDL. Current guidance indicates that TMDLs should be established to meet existing WQS and not a less stringent WQS variance.¹ The Agency should clarify how WQS variances may be considered when establishing a TMDL and how WQS variances may apply in the context of a prior established TMDL. Until this issue is clarified, permittees may be hesitant to pursue a WQS variance in conjunction with water quality trading since it is not clear that a variance would comply with the TMDL.

¹ See https://www.epa.gov/sites/production/files/2015-10/documents/2003_07_23_tmdl_tmdl0103_2004rpt_guidance.pdf

Maximize Market Incentives for Maximum Efficiency in Delivery of Water Quality Uplift

While we recognize the Agency's current proposal on "baseline" issues as a positive and necessary first step, ERBA strongly encourages the Agency to consider how water quality trading can achieve environmental goals outside of compliance with TMDLs. ERBA's industry veterans note that in practice the drivers and market signals for water quality trading have largely remained stagnant since the 2003 Water Quality Policy, despite the establishment at the federal and state level of additional water resources restoration goals.

All stakeholders benefit when agencies and restoration providers can coordinate across programs to maximize market incentives to efficiently deliver large scale ecological uplift. For example, states within the Chesapeake Bay watershed committed to the restoration of 900 miles of riparian forest buffers per year, yet on average the states meet just 29% of this restoration target each year and in 2017 only restored 56 miles of riparian buffer.² If regional trading markets were expanded to value additional offsets and restoration outcomes, such as riparian forest buffers, states would expand their ability to achieve environmental targets.

For watersheds across the country, ERBA recommends the Agency consider broadening market based approaches by coordinating water quality policies so that multiple demands are driving the market supply of water quality offsets. With clear policies established to support market durability, third party restoration providers will respond with increased investment in creative large-scale water quality solutions. These market-driven investments expand the public's capacity to meet environmental targets because markets apply private capital and land resources towards restoration, in addition to and without draining, restoration efforts also occurring on public lands and through publicly funded programs.

Considerations on Implementation and from the Mitigation Program

In a parallel market, the Compensatory Mitigation Rule at 33 CFR 332 provides regulatory certainty and transparency on performance targets and project requirements for mitigation, which enabled substantial growth in private investment and maturity in the marketplace. The Agency has an opportunity to bring similar market forces to public water quality goals if the Agency clearly signals when non-point source projects can offset point source discharges and transparently establishes water quality limits and requirements for trading offsets.

² Chesapeake Bay Program progress reports available at <https://www.chesapeakeprogress.com/abundant-life/forest-buffers>.

Similarly, there is a regulatory commitment and implementation element that will support market success. When the Agency is reviewing a state or municipality's proposed limits under their TMDLs, if the locality has not done so in their proposal, the Agency should encourage the locality to adopt or at least demonstrate that due consideration was given to water quality trading mechanisms as an integral tool for compliance.

ERBA also recommends that the Agency survey existing water quality trading models to determine important factors for success and identify other geographic regions that would benefit from a similar model approach. For example, Clean Water Services of the Tualatin River Watershed in Oregon found success for the environment, local residents, and permittees through trading under an integrated municipal permit when there was a strong regulatory driver, clear environmental goal, buy-in from community stakeholders, and flexibility at multiple government levels to support the trading approach.³

Questions? Contact Us

Thank you for your consideration of ERBA's comments. Please do not hesitate to contact ERBA if we can further assist as an industry resource to the Agency.

Sara Johnson, Executive Director
The Ecological Restoration Business Association
sjohnson@ecologicalrestoration.org

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³ Read more about the success of the temperature trading program at Cochran, Bobby and Charles Logue, 2010. A Watershed Approach to Improve Water Quality: Case Study of Clean Water Services' Tualatin River Program. Journal of the American Water Resources Association (JAWRA) 1-10. DOI: 10.1111/j.1752-1688.2010.00491.x.